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No. 549

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

WALLY KELBERINE and LENKA BERLIN, ET AL.,
Petitioners,

v.

SOCIETE INTERNATIONALE, ETC. (INTERHANDEL), RAMSEY CLARK, ACTING ATTORNEY GENERAL, and HENRY FOWLER, SECRETARY OF THE TREASURY.

PETITION FOR A REHEARING UPON THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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January, 1967

PRESS OF ALLEN, LANE & SCOTT, PHILADELPHIA

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Petitioner prays for a Rehearing upon the Petition that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on April 7, 1966.

The Petition for a Writ of Certiorari was denied on December 12, 1966.

Petitioner prays for a Rehearing upon the grounds that Congress has consented to this suit by clear implication; the Brief for the Acting Attorney General and the Secretary

of the Treasury in Opposition was erroneous in a substantial and controlling factor in the reference to the legislative history of the 1962 amendment to the Statute in question; this erroneous statement of legislative history had a substantial and controlling effect in the opposition to the Petition for Writ of Certiorari; this statement as to legislative history was made for the first time in this entire proceedings in the Brief in Opposition; that petitioner acting diligently and promptly has now completed the necessary research to establish and present to this Court not only the erroneous nature of these statements as to legislative history; but also the fact that the correct statement of legislative history, not previously presented to the Court, constitutes within its details and their implications the basis of Congressional consent to the suit of the petitioner, and the removal of the sovereign immunity to suit herein.

ERRONEOUS STATEMENTS OF BRIEF IN OPPOSITION

At page 9, line 27, of the Brief in Opposition for the Acting Attorney General, it is stated:

> "Nothing in the 1962 amendment or its legislative history supports petitioners' contention that Congress wanted to put parties in Section 9 cases to the additional, expensive and useless formality of prolonging their litigation to final judgment when all concerned had reached agreement settling their rights."

Further on Page 9 and at Line 8 the Brief in Opposition states:

> "As the legislative history makes clear, the amendment was intended to increase, not to circumscribe, the Attorney General's discretion in alien property matters."

FIVE SPECIFIC INSTANCES OF LEGISLATIVE HISTORY

Contrary to the statements and the implications of the Brief in Opposition, there are the following five specific instances of the legislative history which supports the position of the Petitioners. Thorough research of the entire legislative history has found no legislative history to support the position of the Brief in Opposition. The legislative history sustains the consent of Congress to the suit herein as will be set out in detail below.

In the report of the Committee on Interstate and Foreign Commerce, which was the Committee which handled this legislation, there is presented, as an Appendix, a letter from the U. S. Department of Justice, Office of the Deputy Attorney General, under date of August 11, 1961 to the Chairman Oren Harris of the Committee on Interstate and Foreign Commerce.

At page 16 of this Appendix, line 16 we find this statement:

> "Further, upon the determination, the Office of Alien Property would be authorized to sell the property and deposit the proceeds of sale in a special account in the Treasury, *to be held in trust pending the entry of final judgment in the suit.*" (Emphasis supplied)

H.R. Rep. No. 2046, 87th Cong.
2d Sess. 16 (1962)

In this report of the Committee at page 2 under the entitlement "Explanation of Reported Bill", paragraph 2 is as follows:

> "The reported Bill would amend Section 9(a) to provide that upon a determination by the President, in time of war or national emergency, that the interest and welfare of the United States require the sale of

any property or interest claimed in any suit filed under this Subsection and pending on or after the date of enactment of this legislation the Alien Property Custodian or any successor, officer or agency may sell the same with the net proceeds of such sale being deposited in a special Treasury Account, *pending the entry of final judgment in the suit.*" (Emphasis supplied.)

Id. at page 2

On September 12, 1962 Senator Mansfield called up the Bill and Senator Keating took the floor to explain the Bill. Senator Keating stated on the floor of the Senate:

"The proceeds from the sale would be deposited in a special account in the Treasury to be held in trust *pending the entry of the final judgment in the suit.*" (Emphasis supplied.)

108 Cong. Rec. 19198 (1962)
(Third Column Third Paragraph)

On March 4, 1963, Senator Mansfield presented to the Senate a report of the settlement of the General Aniline and Film Corporation case and had printed in the Record the announcement of the Attorney General under date of March 13, 1963. In the third column in the fourth paragraph, it is stated:

"Mr. Kennedy said Interhandel stockholders are expected to vote on the proposed settlement this month. If they approve, the Government and Interhandel would enter into a consent judgment, *subject to the approval of the district court.*" (Emphasis supplied.)

109 Cong. Rec. 3332 (1963)
(Column Two)

In the ensuing discussion of this report on the floor of the Senate at Page 3333 of the Congressional Record of March 4, 1963, second column fourth paragraph of the

address of Senator Keating, the following statement is reported as made to the Senate on the floor:

> "Any settlement of this magnitude deserves close scrutiny to make certain that it is in the interests of the United States. In the first instance, this will be the task of the district court, *which will have to approve any consent judgment submitted by the parties.*" (Emphasis supplied.)
>
> *Id.* at page 3333

Thus it is quite clear that the Attorney General in submitting the proposed Bill originally to the Congress and in reporting to the Congress on the settlement, in both instances considered that the final judgment of the Court was an essential step in the process before the funds were to be paid to Interhandel. It is further clear that in both the Senate and the House this was the understanding as the legislative history makes clear.

Petitioner reemphasizes that a thorough and meticulous research has not revealed any statement of any nature which would sustain the erroneous impression given in the Brief in Opposition of the Acting Attorney General.

CONSENT OF CONGRESS TO SUIT FROM JUDICIAL RIGHT TO GRANT INTERVENTION

The importance of these erroneous statements is very clear. In any proceeding for final judgment, the District Court would have had the discretion to permit these petitioners herein, individually and as representatives of the class of victims of Interhandel and I. G. Farben, to intervene. This constitutes consent of Congress to the suit herein. The failure of the Attorney General and Secretary of the Treasury to follow this required procedure before payment, should not become a method of preventing the petitioners from the adjudication of their rights; it should

not deprive them of their property rights without due process; it should not be a technique for the officials concerned to step behind a screen of sovereign immunity when Congress made it clear that there should be no such sovereign immunity in this situation, and has consented to the judicial review and the essential judicial jurisdiction.

PAYMENT TO INTERHANDEL WITHOUT FINAL JUDGMENT NOT INTENDED BY CONGRESS

Under the decisions of this Court if the projected delivery of these funds to Interhandel by the Attorney General and the Secretary of the Treasury is an act which is beyond the legislative intent in that it is not preceded by final judgment of the Court in the suit involved, and if it was the legislative history that it was the intention of the Congress that the final judgment in the Court should precede the payment of any funds to Interhandel, then the Court does have jurisdiction in Petitioners' suit over this projected act of payment and can, since *in personam* jurisdiction has been established over Interhandel, redirect this final act of payment to the Petitioners, representative of the class of victims of Interhandel, in lieu of their payment to Interhandel.

Thus, the prayer for relief in this suit would not be within the category of an unconsented suit against the United States Government, but would be within the category of the proper judicial review of acts and projected acts of officials of the United States Government and within the category of consented suits.

Petitioner further reemphasizes that Petitioners' suit does not constitute an attack upon the settlement or the right to settle.

Petitioner's suit does not constitute any attempt to claim funds in any manner adverse to the United States Government.

CONGRESS CONSENTED TO COURT'S JURISDICTION OVER PAYMENT OF FUNDS

Petitioners' suit is directed specifically to the very important point of the Court's jurisdiction over the final act of payment to Interhandel, of that portion of the proceeds to which the United States lays no further claim. Congress consented to such judicial review. Petitioners' suit is further directed at such time that the United States has no further interest in retaining said funds for its part for any reason whatsoever. Petitioners pray for judgment directing that this payment shall not be made to Interhandel, since it has not been preceded by final judgment in the suit as required by both the language of the act and the clear legislative history, but shall be made in trust for the Petitioners as representatives of the class of citizens of the United States who were victims of the defendant Interhandel and who have not been in any manner compensated within the War Claims Act, as they were not citizens of the United States at the time of World War II.

CONGRESS REQUIRED COURT APPROVAL THROUGH JUDGMENT BEFORE PAYMENT

It is respectfully submitted that the legislative history makes it very clear that the Congress gave to the Attorney General the additional power of sale upon the determination by the President, but with the definite *requirement* that the distribution of the proceeds of such a sale shall be under the *final judgment of the Court.* This act of final payment is thus under the jurisdiction of the Court, *with the consent of Congress to such jurisdiction,* and the direction of the Congress that is required. This act of payment should not be held to be beyond judicial review. To do so would be an unsound extension of the terms of the sovereign immunity from suit doctrine. It would be contrary to the

systems of checks and balances of the United States Constitutional system. It would violate Petitioners' rights under the due process clause of the Constitution of the United States.

SUBSTANTIAL AND CONTROLLING GROUNDS NOT PRESENTED PREVIOUSLY

This is a substantial and controlling grounds. It has not been presented previously to this Court or to the Courts below. It came into view only through the correction of the erroneous statements in the Brief in Opposition, statements which had not been made before.

Petitioners therefore respectfully request a rehearing of their Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit in Wally Kelberine and Lenka Berlin, *et al* vs. Interhandel and the Acting Attorney General and the Secretary of the Treasury.

Respectfully submitted,

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CERTIFICATE OF COUNSEL IN COMPLIANCE WITH RULE

We hereby certify that the foregoing *Petition for Rehearing* is presented in good faith and not for delay, and is restricted to the grounds specified in Paragraph 2 of Rule 58.

HAROLD E. STASSEN

ROGER A. JOHNSEN

January, 1967